No. 80-289

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MICHAEL RODAK, JR.,

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1980

UNITED MINE WORKERS OF AMERICA
LOCAL NO. 1854
and UNITED MINE WORKERS OF AMERICA,
Petitioners,
vs.
NATIONAL LABOR RELATIONS BOARD
and
AMAX COAL COMPANY,
A DIVISION OF AMAX, INC.,
Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF
IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the trustees of multiemployer trusts established pursuant to Section 302(c)(5) of the Labor-Management Relations Act, 1947, 29 U.S.C. §186(c)(5), function in the administration of those trusts as collective bargaining representatives of the parties who appoint them.

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INTEREST OF THE AMICUS CURIAE

Amicus curiae is the Board of Trustees of the United Mine Workers of America ("UMWA") Health and Retirement Funds ("Funds"). The Funds is the collective name for four irrevocable multiemployer trust funds established by the UMWA and the Bituminous Coal Operators' Association, Inc. ("BCOA") in Article XX of the National Bituminous Coal Wage Agreement of 1974 ("1974 Wage Agreement"), pursuant to, and within the scope of, Section 302(c)(5) of the Labor-Management Relations Act, 1947, 29 U.S.C. §141 *et seq.* (1978)("LMRA"). The four trusts are the UMWA 1950 Pension Trust, the UMWA 1974 Pension Trust, the UMWA 1950 Benefit Trust, and the UMWA 1974 Benefit Trust ("Trusts"). Article XX of the National Bituminous Coal Wage Agreement of 1978 ("1978 Wage Agreement") provides for the continuation of the Trusts as amended by the UMWA and the BCOA. The Trusts are employee benefit plans within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1002(3)(1978).

Article XX, Section (e) of the Wage Agreements provides for the administration of the Trusts by a Board of three Trustees appointed for the duration of the Wage Agreements and subject to removal only for cause. Pursuant to the Wage Agreements, and in accordance with Section 302(c)(5)(B) of the LMRA, 29 U.S.C. §186(c)(5)(B), one Trustee is appointed by the UMWA, one by the BCOA, and the third, a neutral, by the other two. The current Trustees of the Funds are Harrison Combs, Chairman, appointed by the UMWA; John J. O'Connell, appointed by the BCOA; and Paul R. Dean, the neutral Trustee. The powers and responsibilities of the Trustees are enumerated in the Trust documents. Under those documents, the Trustees have full discretionary authority to manage and control Trust assets. In that respect, the Trustees are plan fiduciaries within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. §1002 (21)(A). Accordingly, the fiduciary duties imposed by Section 404 of ERISA, 29 U.S.C. §1104, and the prohibitions of Section 406 of ERISA, 29 U.S.C. §1106, fully apply to the Trustees. A Trustee who breaches the fiduciary obligations imposed by those provisions is personally liable under Section 409

of ERISA, 29 U.S.C. §1109, for any resultant losses to the Trust. Under Section 405 of ERISA, 29 U.S.C. §1105, a Trustee is also liable for a breach of fiduciary duty by a co-Trustee, if he has knowledge of the breach.

The Third Circuit has decided that the UMWA and BCOA Trustees of the Funds (hereinafter "the Trustees") are representatives of their appointing parties for the purposes of collective bargaining within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §158(b)(1)(B). The Trustees, however, cannot assume that status consistent with the requirements of Sections 404 and 406 of ERISA, 29 U.S.C. §§1104 and 1106. Consequently, the decision of the Third Circuit places the Trustees in a virtually untenable position. Indeed, the decision exposes the Trustees to substantial liability under Sections 405 and 409 of ERISA, 29 U.S.C. §§1105 and 1109. Clearly, the Trustees have a serious interest in having the Supreme Court review that decision.

STATUTORY PROVISIONS INVOLVED

The following provisions of ERISA are relevant to the interests of the amicus curiae in this action:

29 U.S.C. §1104(a)(1)

Section 404. (a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries. . . .

29 U.S.C. §1105(a)(3)

Section 405. (a) In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

. . .

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. §1106(b)(2)

Section 406. (b) A fiduciary with respect to a plan shall not —

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. . . .

29 U.S.C. §1109

Section 409. (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

STATEMENT OF THE CASE

The UMWA, petitioner herein, is an industrial union that represents bituminous coal miners throughout the United States and Canada for the purposes of collective bargaining and contract administration.

The respondent, Amax Coal Company, a division of AMAX, Inc. ("Amax"), operates several bituminous coal mines in the midwestern United States. With regard to those mines, Amax is a member of the BCOA, an employers' association which represents bituminous coal operators for purposes of collective bargaining and contract administration. Amax, however, also operates a western subbituminous mine. That mine is not within the scope of the BCOA's representation.

In 1974, the UMWA and the BCOA engaged in collective bargaining negotiations which resulted, on December 6, 1974, in the 1974 Wage Agreement, and the establishment therein of the four trust funds, known collectively as the Funds. As a member of the BCOA, Amax participated in the negotiations leading to

the Wage Agreement and had a voice in the selection of the BCOA Trustee.

Amax's western subbituminous mine was not covered, however, by the 1974 Wage Agreement. Nor was the mine covered by the Western Surface Coal Mine Wage Agreement of 1975 ("Western Agreement"), a separate agreement negotiated by the UMWA and an employer association representing western subbituminous and lignite mines. Instead, Amax and the UMWA negotiated directly for an agreement covering Amax's western mine. This case arose from those negotiations.

Included in the contract proposals submitted by the UMWA was a provision known as the "Trustee Clause." The Trustee Clause would have required Amax to participate in the Funds. Amax repeatedly objected to this Clause, on the basis that the Funds' management Trustee had already been selected, pursuant to the 1974 Wage Agreement. The UMWA, however, insisted to impasse upon the Trustee Clause.

In Amax's view, the UMWA's insistence upon the Trustee Clause constituted coercion in its selection of a collective bargaining representative within the meaning of Section 8(b)(1)(B) of the NLRA. Accordingly, in January, 1975, Amax filed unfair labor practice charges against the UMWA and Local 1854 with the National Labor Relations Board ("Board"). Thereafter, the Director of Region 27 of the Board issued an amended consolidated complaint on behalf of the General Counsel of the Board. The complaint alleged, *inter alia,* that the UMWA had engaged in an unfair labor practice within the meaning of Sections 8(b)(1)(B) and 8(b)(3) of the NLRA by insisting to impasse on the Trustee Clause.

A hearing on the charges was held on various dates in June and July of 1976, before an Administrative Law Judge. On March 22, 1977, the Judge issued a decision concluding, in relevant part, that the Funds' Trustee appointed by the BCOA is not a representative for purposes of collective bargaining as that term is used in Section 8(b)(1)(B) of the NLRA, and recommending the dismissal of that part of the complaint which alleged that the UMWA had violated Sections 8(b)(1)(B) and 8(b)(3) of the NLRA by insisting that Amax participate in the Funds even though the Company had not selected the Trustee. The Board affirmed this finding and recommendation as part of its decision

and final order issued on September 29, 1978.

Amax and the UMWA petitioned the Third Circuit for review of the Board's entire decision and order. The Board petitioned the Third Circuit for enforcement of its order. Amax intervened in the UMWA petition, and the UMWA intervened in that of Amax. The cases were subsequently consolidated on appeal.

The case was argued before Circuit Judges Gibbons and Higginbotham and District Judge Ziegler of the United States District Court for the Western District of Pennsylvania. The decision of the Court, in which Judge Gibbons did not participate, appears in an opinion written by Judge Higginbotham and filed on February 1, 1980. That decision reverses, in part, the decision of the Board, by holding that the Trustees of the Funds are collective bargaining representatives within the meaning of Section 8(b)(1)(B) of the NLRA, and that the UMWA's insistence to impasse upon the Trustee Clause, therefore, violates Sections 8(b)(1)(B) and 8(b)(3) of the NLRA.

The UMWA, Amax and the Board each petitioned the Third Circuit for rehearing *en banc*. The petitions were denied on May 29, 1980. The UMWA petition for a writ of certiorari followed. Amicus curiae support that part of the UMWA petition which requests the Supreme Court to review the Third Circuit's decision that the Trustees are collective bargaining representatives.

SUMMARY OF ARGUMENT

That part of the decision of the Third Circuit which holds that the Trustees of the Funds are collective bargaining representatives conflicts with existing law and Congressional intent. Therefore, it should be reviewed by the Supreme Court.

The Congressional purpose in enacting Section 302(c)(5) of the LMRA was to ensure that collectively bargained employee benefit funds were established and administered as legitimate trust funds, free from the labor-management politics inherent in collective bargaining. Indeed, the courts that subsequently construed Section 302(c)(5) invariably concluded that the trustees of funds established thereunder may not act solely in the interest of their appointing parties, as collective bargaining agents are required to do. Instead, the courts have consistently found that

such trustees have an independent and overriding fiduciary duty to act solely in the interest of the beneficiaries of the trust funds they administer.

ERISA does not change the rule under Section 302(c)(5) of the LMRA. Certainly, if Congress had intended trustees of funds established under Section 302(c)(5) to act as collective bargaining representatives, it would have enacted a different standard of duty. Congress chose, however, to adopt the rule that trustees owe undivided loyalty to the beneficiaries of the trusts they administer. 29 U.S.C. §1104(a)(1)(A)(i). Indeed, Section 406 of ERISA, 29 U.S.C. §1106(b)(2), specifically prohibits trustees from assuming loyalties which prevent them from acting exclusively for the benefit of trust beneficiaries.

The two-judge panel of the Third Circuit ignored these provisions, and misconstrued the judicial decisions which they affirm, in erroneously deciding that trustees of funds established under Section 302(c)(5) are collective bargaining representatives of the parties who appoint them. Therefore, the UMWA petition for a writ of certiorari should be granted.

ARGUMENT

The Supreme Court should grant the petition for a writ of certiorari because the decision of the Third Circuit is in conflict with existing law and contrary to the intent of the Congress.

Section 302(c)(5) of the LMRA requires that employers and employees be equally represented "in the administration of" the trusts established thereunder. 29 U.S.C. §186(c)(5)(B). The Section refers to the trustees of such trusts as "representatives" of the employers and employees who appoint them. *Id.* The Third Circuit construed the term "representatives" under Section 302(c)(5) to be "representatives for the purposes of collective bargaining" under Section 8(b)(1)(B) of the NLRA, 29 U.S.C. §158(b)(1)(B). Trustee representation of employers and employees "in the administration of" a Section 302(c)(5) trust is not, however, tantamount to representation "for purposes of collective bargaining" within the meaning of Section 8(b)(1)(B) of the NLRA, 29 U.S.C. §158(b)(1)(B). This is readily apparent from

the purpose of Section 302(c)(5) as revealed by the legislative history.

The legislative history of Section 302(c)(5) does not specifically address the duties and responsibilities of trustees who administer trust funds established thereunder. It reveals, however, that the sole purpose of the provision is to ensure that employee welfare funds are established as "legitimate trust funds," free of the abuses inherent in unilateral union administration. 93 Cong. Rec. 4678, 4746-7 (1947); *see also* 93 Cong. Rec. 3562-66, 3634 (1947); *United Marine Division, I.L.A., Local 333, A.F. of L. v. Essex Transportation Co.*, 216 F.2d 410, 411-12 (3d Cir. 1954); *Blankenship v. Boyle*, 329 F.Supp. 1089, 1094-95 (D.D.C. 1971). Consistent with that purpose, Congress provided that payments to welfare funds would be permitted only if the payments were held in trust for the "sole and exclusive benefit of the employees," and employers and employees were equally represented "in the administration of the trusts." *Id.;* 29 U.S.C. §186(c)(5). It is obvious that Section 302(c)(5) was "designed expressly to isolate . . . welfare funds from labor-management politics." *Blankenship v. Boyle, supra,* 329 F. Supp. at 1094. Consistent therewith, Congress did not intend trustees of such funds to be collective bargaining representatives. Rather, they were intended to act as fiduciaries in the sole interest of the beneficiaries.

Any doubt about this fact is resolved by the judicial decisions construing the term "representatives" in Section 302(c)(5). Significantly, after considering the legislative history of Section 302(c)(5), the Third Circuit concluded in an earlier case that:

> These trustees [of a Section 302(c)(5) trust fund] were not, in our judgment, representatives of the employees. They were trustees of a welfare fund. It is true that they were chosen half and half by the employers' association and this union. But we think that when set up as a board, as they were in this case, these individuals are not acting as representatives of either union or employers. They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees. [*United Marine Division, I.L.A., Local 333, A.F. of L. v. Essex Transportation Co., supra,* 216 F.2d at 412.]

Based upon that conclusion, the Court held that payment to the trustees of a Section 302(c)(5) welfare fund by an employer who

was not a member of the employer association which appointed the management trustee was not an illegal payment to "any representative" of the employers' employees within the meaning of Section 302(a) of the LMRA. *Id.* at 413.

The District Court for the District of Columbia similarly construed the legislative intent of Section 302(c)(5) in a case involving the Trustees of the UMWA Welfare and Retirement Fund of 1950 ("1950 Fund"), the predecessor of the Funds. In *Blankenship v. Boyle, supra,* the Court rejected the argument that trustees, as "representatives" of labor and management, may act in the interest of their appointing parties and expressly found that:

> . . . there is nothing in the Labor-Management Relations Act or other federal statutes or in their legislative history which can be said to alleviate the otherwise strict common-law fiduciary responsibilities of trustees appointed for employee welfare or pension funds developed by collective bargaining. [*Blankenship v. Boyle, supra,* 329 F. Supp. at 1094. *Accord, United Marine Division, I.L.A., Local 333, A.F. of L. v. Essex Transportation Co., supra,* 216 F.2d at 412.]

Based on that rationale, the Court held that the Trustees of the 1950 Fund breached their fiduciary duty by failing to act in the exclusive interest of the beneficiaries of the Fund. *Id.* at 1094-95.

In *Miniard v. Lewis,* 387 F.2d 864 (D.C.Cir. 1967), *cert denied,* 393 U.S. 873, another case involving the Trustees of the 1950 Fund, the District of Columbia Circuit rejected a claim of unfair representation against the UMWA Trustee on the basis that the Trustee was not a collective bargaining representative. In rejecting the claim, the Court stated:

> Even though the fund here resulted from bargaining between the employers and the union, we believe that the traditional duty owed by a union to its members is not applicable. Rather, the trustees' duties are those of fiduciaries because *as trustees* they perform a separate function and do not act as representatives of either the employers or the union. [*Miniard v. Lewis, supra,* 387 F.2d at 865, note 5.]

Other courts have similarly delimited the scope of the trustees' representative capacity. As "representatives," trustees may con-

sider and, in their discretion, adopt recommendations of the collective bargaining parties "pertinent to effective administration of the [f]und." *Toensing v. Brown,* 528 F.2d 69, 72 (9th Cir. 1975). Trustees, however, may not be bound by those recommendations. *Toensing v. Brown, supra,* 528 F.2d at 72; *Lamb v. Carey,* 498 F.2d 789, 794 (D.C.Cir. 1974); *see also Miniard v. Lewis, supra,* 387 F.2d at 865, note 5; *United Marine Division, I.L.A., Local 333, A.F. of L. v. Essex Transportation Co., supra,* 216 F.2d at 412. That is because trustees, as fiduciaries, are bound to exercise independent judgment in administering trust funds established under Section 302(c)(5). They must, in all instances, act solely in the interest of the beneficiaries of the funds. *Id.* Indeed, they may not be removed by their appointing parties except for breach of fiduciary duty. *Lamb v. Carey, supra,* 498 F.2d at 794.

Lamb v. Carey, supra, well illustrates the relationship between a trustee's representative and fiduciary capacities. In that case, the District of Columbia Circuit recognized that communication between a trustee and his appointing party is essential to informed decisions in the best interests of the trust beneficiaries. Accordingly, the Court affirmed a district court decision and order removing the UMWA Trustee of the 1950 Fund solely because his intense political antagonism toward the UMWA management precluded him from representing the UMWA effectively. In doing so, however, the Court emphasized that:

> Regardless of their representative relationships, the Trustees of the Fund are still required to act with the highest fiduciary integrity toward the Fund and the beneficiaries. [*Lamb v. Carey, supra,* 498 F.2d at 793.]

These decisions make it perfectly clear that the duties of "representative" trustees of funds established pursuant to Section 302(c)(5) are diametrically opposed to those of collective bargaining representatives. Collective bargaining representatives are bound as agents of their appointing parties to follow the instructions and act in the sole interest of the parties who appoint them. They are compensated by those parties and are subject to removal for any reason at all. *See Sheet Metal Workers International Association,* 234 N.L.R.B. 1238, 1247 (1978), *pet. for review pending* (5th Cir., No. 79-2396). Under

Section 302(c)(5), however, trustees are bound as fiduciaries to exercise independent judgment and to act solely in the interests of the beneficiaries of the funds they administer. They are compensated, if at all, by the trusts, and may be removed only for cause.

ERISA does not change the law under Section 302(c)(5). If Congress had intended the trustees of Section 302(c)(5) trust funds to act as collective bargaining representatives, ERISA would have provided different standards of duty. Section 404 of ERISA, however, reaffirms the judicial decisions under Section 302(c)(5). 29 U.S.C. §1104(a)(1)(i). This is apparent from statements made by Senators Randolph and Williams and Representative Thompson during full Senate and House consideration of the Multiemployer Pension Plan Amendments Act of 1980. 119 Cong. Rec. S 10104 (daily ed. July 29, 1980) (remarks of Senators Randolph and Williams); 126 Cong. Rec. H 7902 (daily ed. August 26, 1980) (remarks of Rep. Thompson).

Any doubt about this fact is resolved by Section 406(b)(2) of ERISA, 29 U.S.C. §1106(b)(2), and its legislative history. Section 406 provides:

> (b) A fiduciary with respect to a plan shall not —
>
> . . . .
>
> (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. . . . [29 U.S.C. §1106(b)(2).]

According to the joint explanatory statement of the Committee on Conference, this prohibition

> prevents a fiduciary from being put in a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries.

[Conference Report No. 93-1280, 93d Cong., 2d Sess. 309 (1974).]

The strict prohibition of Section 406(b)(2) has been recently enforced in another context by the Third Circuit in *Cutaiar v. Marshall,* 590 F.2d 523 (3d Cir. 1979). In that case, the Third Circuit specifically recognizes that, while the LMRA establishes certain structural and procedural requirements for benefit plans, ERISA creates "numerous higher standards for the administration of such plans." *Id.* at 530.

In this case, however, the Third Circuit ignored those "higher standards" and held that trustees of trust funds established under Section 302(c)(5) are collective bargaining representatives within the meaning of Section 8(b)(1)(B) of the NLRA. In reaching this erroneous decision, the two-judge panel relied upon the following dictum from an earlier decision of the same Circuit:

> "The starting point for analysis must be the candid recognition that the relationship between employer and employee trustees of an employee benefit trust fund is quasi-adversarial in nature. Naturally, the trustees of such a trust fund function are fiduciaries for the funds' beneficiaries but they also serve as representatives of the parties who appoint them. Insofar as it is consistent with their fiduciary obligations, employer trustees are expected to advance the interests of the employer while employee trustees are expected to further the concerns of the union in the ongoing collective bargaining process between them. *See Lamb v. Carey,* 162 U.S.App.D.C. 247, [251,] 498 F.2d 789, 793 (1974); *Toensing v. Brown,* 374 F.Supp. 191 (N.D. Cal. 1974), aff'd, 528 F.2d 69 (9th Cir. 1975); Goetz, *Developing Federal Labor Law of Welfare and Pension Plans,* 55 Cornell L. Rev. 901, 921 et seq. (1970). The trustees ' efforts to improve the position of the parties they represent are completely legitimate—indeed, they are essential to the operation of section 302(c)(5). Congress envisioned the conflict of views of employer and employee as a distilling process which would provide safeguards against trust fund corruption." [*Amax Coal Company v. NLRB,* 614 F.2d 872, 881-82 (3d Cir. 1980), quoting *Associated Contractors of Essex County, Inc. v. Laborers' International Union of North America,* 559 F.2d 222, 227-28 (3d Cir. 1977).]

Obviously, this dictum does not support the conclusion that

trustees are collective bargaining representatives. Instead, it is wholly consistent with the cases construing the term "representative" under Section 302(c)(5). Indeed, the Third Circuit cites two of those cases with approval in the very statement upon which the two-judge panel relied.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for certiorari should be granted with respect to the Third Circuit's holding that trustees of trust funds established under Section 302(c)(5) are collective bargaining representatives of the parties who appointed them.

Respectfully submitted,

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